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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. Vinod Chandrashekm Patwardhan, Defendant.	Case No. ***EDCV 12-00992 VAP*** EDCR 08-00172 VAP **ORDER DENYING MOTION FOR RELIEF UNDER 28 U.S.C. SECTION 2255**

Defendant-Petitioner Vinod Chandrashekm Patwardhan ("Petitioner") filed this Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence ("Motion") on June 18, 2012. (Doc. No. 254.[1]) On August 8, 2012, the Government filed its Opposition to the Motion ("Opposition"). (Doc. No. 258.) Petitioner filed his

[1] Many of the documents appear on both the civil docket for this case, United States v. Patwardhan, No. ED-CV-12-00992-VAP (C.D. Cal. filed June 18, 2012), and on the docket for the underlying criminal case, United States v. Patwardhan, No. ED-CR-08-00172-VAP (C.D. Cal. filed Sept. 10, 2008). Unless otherwise noted, all citations to docket numbers refer to the criminal case docket.

Reply[2] on September 12, 2012.[3] (Civ. Doc. No. 9.) For the reasons set forth below, the Court DENIES the Motion.

I. BACKGROUND

Following an eight-day jury trial from April 28, 2009 to May 8, 2009, Petitioner was convicted of the following: (1)conspiracy to introduce misbranded drugs into interstate commerce with intent to defraud or mislead, in violation of 21 U.S.C. §§ 331(a), 333(a)(2), 352(c), and 352(f)(1); (2) fraudulently and knowingly importing merchandise into the United States in violation of 18 U.S.C. § 545; (3) stealing Medicare reimbursement payments exceeding $1,000, in violation of 18 U.S.C. § 641; (4) defrauding the United States of and concerning its governmental functions and rights, namely, to interfere with or obstruct the lawful functions of the FDA, HHS, and DHS by deceit, craft, trickery and dishonest means; (5) introducing misbranded drugs into

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[2] Petitioner's Reply brief exceeds the page limits set by the Court's Standing Order. (See Standing Order at 2-3 ("Memoranda of Points and Authorities in support of or in opposition to motions shall not exceed 25 pages. Replies shall not exceed 12 pages. Only in rare instances, and for good cause shown, will the Court agree to extend these page limitations.") Petitioner's Reply brief is 25 pages long and Petitioner did not move for leave to file a brief that exceeded the applicable page limits.

[3] On February 26, 2013, the Court provided the Government leave to file a supplemental brief addressing three issues raised by Petitioner for the first time in his Reply brief. (See Civ. Doc. No. 10). The Government filed its supplemental brief on March 27, 2013. (See Civ. Doc. No. 12.)

interstate commerce with the intent to defraud and mislead in violation of 21 U.S.C. §§ 331(a), 333(a)(2), 352(c), and 352(f)(1); (6) fraudulently and knowingly importing drugs purchased in India into the United States contrary to law in violation of 18 U.S.C. § 545; and (7) aiding and abetting the fraudulent and knowing importation of drugs purchased in Honduras into the United States contrary to law in violation of 18 U.S.C. § 545. (See Doc. No. 164.)

On September 21, 2009, the Court imposed a sentence of probation for five years under terms and conditions, including nine months of home detention and 1,000 hours of community service, and a $10,000 fine. (See Doc. Nos. 212, 213.) After entering judgment against Petitioner on Counts Seven (criminal forfeiture) and Eight (civil forfeiture) of the second superseding indictment, the Court also ordered Petitioner to pay $1,313,634.10 in restitution/forfeiture. (See Doc. Nos. 211, 213.)

Petitioner appealed his conviction. (See Doc. No. 216.) On March 18, 2011, the Ninth Circuit Court of Appeals affirmed the conviction, finding "overwhelming evidence" supported the jury's verdict. United States v. Patwardhan, 422 Fed. Appx. 614, 617, 2011 WL 939244, at *2 (9th Cir. Mar. 18, 2011).

On November 28, 2012, the Court ordered early termination of Petitioner's probation, "discharged [Petitioner] from supervision," and terminated the case. (Doc. No. 261) For purposes of this Motion, Petitioner was "in custody" at the time he filed this Motion, and the Court retains jurisdiction to decide the Motion despite Petitioner's subsequent release from custody. See United States v. Spawr Optical Research, Inc., 864 F.2d 1467, 1470 (9th Cir. 1988) (district court's jurisdiction over Section 2255 Motion measured at the time of filing; if petitioner in custody at time of filing, jurisdiction is satisfied); United States v. Span, 75 F.3d 1383, 1386 n.5 (9th Cir. 1996) (petitioner on probation meets the 'in custody' requirement for Section 2255 jurisdiction).

II. LEGAL STANDARD

Section 2255 permits federal prisoners to file motions to vacate, set aside, or correct a sentence on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]" 28 U.S.C. § 2255. The Supreme Court has "repeatedly stressed the limits of a § 2255 motion . . . [and] cautioned that § 2255 may not be used

as a chance at a second appeal." United States v. Berry, 624 F.3d 1031, 1038 (9th Cir. 2010) (citing United States v. Addonizio, 442 U.S. 178, 184 (1979)).

Petitioner bears the burden of establishing any claim asserted in his Section 2255 motion. To warrant relief because of constitutional error, Petitioner must show that the error was one of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings. See Hill v. United States, 368 U.S. 424, 428 (1962).

III. DISCUSSION[4]

Petitioner asserts one ground for Section 2255 relief in his Motion, i.e., his Sixth Amendment right to effective assistance of counsel was violated by his defense attorneys' conduct in the course of his trial which, he argues, fell below an objective standard of reasonableness. (See Mot. ¶ 6.)

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[4] In its analysis, the Court relies on cases applying the legal standard for ineffective assistance of counsel announced in Strickland v. Washington, 466 U.S. 668 (1984). Some of the decisions the Court relies upon resolved habeas petitions brought under 28 U.S.C. § 2254 ("Section 2254"), as opposed to the statute under which Petitioner brought the instant action, i.e., 28 U.S.C. § 2255 ("Section 2255"), which is a different standard against which the Court must review the petition. The Ninth Circuit has held, however, that rules governing ineffective assistance of counsel claims in Section 2255 cases are "nearly identical ... in substance" to the rules governing Section 2254 cases. United States v. Buenrostro, 638 F.3d 720, 722 (9th Cir. 2011).

As the U.S. Supreme Court has held, "the proper standard for attorney performance is reasonably effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish ineffective assistance of counsel, Petitioner must prove (1) "counsel's representation fell below an objective standard of reasonableness," and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Under the second component, Petitioner must demonstrate his attorney's errors rendered the result unreliable or the proceedings fundamentally unfair. Fretwell v. Lockhart, 506 U.S. 364, 372 (1993); Strickland, 466 U.S. at 694.

A claim of ineffective assistance of counsel requires proof of both of these elements. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Strickland, 466 U.S. at 697.

The petitioner bears a heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial strategy. Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001). A habeas petitioner must make a sufficient factual showing to substantiate the claims. United States v. Schaflander, 743 F.2d 714, 721 (9th Cir. 1984). Conclusory allegations not supported by specifics do not warrant relief. Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995). The relevant inquiry is not what counsel could have pursued but whether the choices that were made were reasonable. Turner v. Calderon, 281 F.3d 851, 877 (9th Cir. 2002). The standard of review "must be highly deferential" and must include "a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." Strickland, 466 U.S. at 689-90.

A petitioner must also show he suffered prejudice under a test of a reasonable probability of a different outcome. Strickland, 466 U.S. at 687-94. The prejudice must be such that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. If a petitioner fails to show this prejudice, the reviewing court may reject the

claim of ineffective assistance of counsel without even reaching the issue of deficient performance. Id. at 697; see Williams v. Taylor, 529 U.S. 362, 390 (2000).

A. Ineffective Assistance

Petitioner identifies six categories of purported failings by his counsel, with specific examples provided in each, to support his claim of ineffective assistance of counsel. (Mot. ¶ 6.) The Court addresses each of Petitioner's arguments in turn.

1. Irrelevant, prejudicial, and improper character evidence

Petitioner argues his counsel "failed to object and/or move to strike irrelevant unduly prejudicial and/or improper character evidence." (See Mot. at ¶ 6.1.)

a) Testimony of Norma Franco, Melinda Funk, and Jessica Perez about failure to store drugs properly

Petitioner argues his counsel provided him with constitutionally defective assistance when he failed to object and move to strike testimony from Norma Franco, Melinda Funk, and Jessica Perez about the storage of imported drugs at Petitioner's office at room temperature. (Mot. at ¶ 6.1; Reply at 4.) Petitioner

also argues, in response to the United States' contention that defense counsel did object to testimony regarding the improper storage of imported medicine, that there were several points at which Franco, Funk, and Perez testified about the improper storage of imported drugs without defense counsel raising any objections. (Reply at 4.)

To his detriment, Petitioner offers no argument, factual analysis, or legal authority to demonstrate why or how the aforementioned testimony was irrelevant, unduly prejudicial, or improper character evidence, or, more importantly, how defense counsel's failure to object or move to strike this testimony fell below the "objective standard of reasonableness" "under prevailing professional norms." Strickland, 446 U.S. at 688; (see Reply at 4.) Petitioner only points out instances in Franco's, Funk's, and Perez's testimony where they referred to storage of the imported drugs to which defense counsel did not object. (Mot. at ¶ 6.1; Reply at 4.)

Petitioner offers nothing to support his argument but bald conclusions, which do not warrant habeas relief. Jones v. Gomez, 66 F.3d at 205. Accordingly, Petitioner does not meet his burden of substantiating his claim for ineffective assistance of counsel on this basis.

Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

b) Testimony of Katherine Walton about her mother's death

Petitioner argues his counsel rendered ineffective assistance when he failed to object to or move to strike the testimony of Katherine Walton about her mother's death following treatment by Petitioner with the imported drugs. (Mot. at ¶ 6.1; Reply at 5.) Specifically, he argues this testimony led the jury to infer Walton's mother died because she had been treated with improperly stored imported medicine under Petitioner's care, which, he argues, was irrelevant and unduly prejudicial. (Reply at 5.)

The Government called Jessica Perez as a witness immediately before Katherine Walton testified. Perez previously worked as Petitioner's office administrator. (Reporter's Transcript ("RT") Apr. 30, 2009, Doc. No. 229 at 134-136.) Perez testified, inter alia, that she witnessed drugs being kept in non-refrigerated conditions at Petitioner's office. (Id. at 138-140, 150-153, 213-214.)

During a break in Perez's testimony and outside the presence of the jury, the Court raised, sua sponte, its

concern that testimony regarding the storage conditions for the drugs at Petitioner's office appeared to be irrelevant to any of the charged offenses and could confuse or mislead the jury. (Id. at 171-181.) The parties argued their respective positions and the Court ruled it would instruct the jury that refrigeration of the chemotherapy medications was not at issue in the case and that the jury should not consider any of the testimony as evidence that any patients were harmed because of the lack of refrigeration. (Id. at 171-181, 247-248.)

Following Perez's testimony, the Government called Katherine Walton. Walton testified that she cared for her mother, Veronica Lin, who lived with her while she received cancer treatment over the course of two and a half years. (Id. at 219-220.) Petitioner treated Lin's uterine cancer from June 2005 until November 2007. (Id. at 220.) Lin died on December 24, 2007. (Id.)

Specifically, Walton testified: "I drove her to every single solitary doctor's appointment, radiation, chemo, I was with her through everything. And I was her caretaker in my home. I mean, I prepared all her meals for her and took care of her." (Id.) She testified that she took Lin to every appointment with Petitioner and spoke to Petitioner regularly about her mother's care. (Id. at

220-222.) On occasion, Walton had to inject her mother with medicine at home; Petitioner's staff provided Walton the medicine in syringes. (Id. at 222-224.) Walton testified that, on one occasion, Petitioner's staff provided her a syringe for her mother labeled with a name she did not recognize; Walton asked Petitioner's nurse, Norma Franco, about the medication and Franco told Walton it was just like the drug that Walton had been administering to her mother previously. (Id. at 223-224, 232, 238-239.)

At the end of the trial, the Court issued a limiting instruction to the jury, as follows:

> Evidence has been presented during this trial about the manner in which the defendant transported imported drugs and the temperature of those drugs when they were transported to defendant's medical office. Neither the condition or efficacy of these drugs, nor the manner in which they were transported, is an element of any of the crimes the defendant is charged with committing. I hereby instruct you that you may consider evidence concerning the manner in which the drugs were transported, including their temperature, only to the extent that such evidence relates to whether the defendant possessed the necessary state of mind for each of the charged crimes.

(Court's Instruction No. 12, Doc. No. 162.)

First, Walton's testimony about her mother's death was neither irrelevant nor unduly prejudicial. The testimony was relevant because it showed the extent of the witness's involvement in and knowledge of her mother's medical care by Petitioner. See Fed. R. Evid. 401. Walton's testimony was not unduly prejudicial because her reference to her mother's death was not pronounced; she mentioned it twice briefly at the outset of her testimony and not again. See Fed. R. Evid. 403; (RT, Apr. 30, 2009 a.m., Doc. No. 229 at 219-232.) She did not testify about the impact of her mother's death. (Id.) Walton's testimony primarily concerned her mother's medical treatment from Petitioner and, in particular, the instance when she did not recognize the name on one of the syringes she received from Petitioner's staff. (Id.)

In addition, at no point during the trial did the Government argue expressly or by implication that Petitioner was responsible for Walton's or anyone else's death. (See, e.g., RT May 7, 2009 a.m., Doc. No. 183 at 81-82.) Finally, Walton's testimony was not unduly prejudicial because it is reasonable for a doctor treating cancer patients for over 30 years to have at least a few patients under his care who died.

In any event, it was a reasonable tactical decision of defense counsel not to object or move to strike Walton's passing references to her mother's death. Strickland, 466 U.S. at 689-90; Furman v. Wood, 190 F.3d 1002, 1006 (9th Cir. 1999) ("Counsel's tactical decisions are virtually unchallengeable."); Guam v. Santos, 741 F.2d 1167, 1169 (9th Cir. 1984) (a tactical decision by counsel that the defendant later disagrees with is not a basis for an ineffective assistance of counsel claim). Had defense counsel objected to Walton's reference to her mother's death, it could have highlighted the fact for the jury, so it was reasonable not to call the jury's attention to the fact further. See Werts v. Vaughn, 228 F.3d 178, 204-205 (3d Cir. 2000) (finding counsel did not provide ineffective assistance when decision not to object was counsel's tactic not to "highlight" or "draw attention" to certain issues); Barnes v. Gonzales, 2012 WL 3930351, at *13 (C.D. Cal. Sept. 10, 2012) (finding no ineffective assistance of counsel when attorney chose "not to object to avoid highlighting an incriminating fact"); see also Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962) ("if you throw a skunk into the jury box, you can't instruct the jury not to smell it.") (internal quotation omitted). Moreover, as stated supra, Walton's reference to her mother's death was not unduly prejudicial; accordingly, had defense counsel objected to her testimony, the Court likely would have overruled the

objection. See Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) (finding counsel did not render deficient performance by failing to raise a meritless objection).

Even viewing Walton's reference to her mother's death in light of Perez's testimony about the refrigeration of the imported drugs and assuming, arguendo, Petitioner's counsel was deficient in not objecting to this testimony, the Court finds Petitioner has not met his burden of proving he was prejudiced by his attorneys' deficiency. As stated supra, the Court instructed the jury that the condition or efficacy of the imported drugs was not at issue, except to the extent the evidence reflected Petitioner's criminal intent. (See Court's Instruction No. 12, Doc. No. 162.) The Court presumes the jury followed the instructions provided throughout the trial, including the aforementioned limiting instruction. See Weeks v. Angelone, 528 U.S. 225, 234 (2000). Petitioner has not rebutted this presumption, as he has not argued, let alone presented evidence to demonstrate, that the jury disregarded any of the instructions provided by the Court. (See generally Mot.; Reply.) Thus, in light of the Court's jury instruction no. 12, the Court finds Petitioner could not have suffered the prejudice he argues, i.e., that the jury inferred that Lin died as a result of being treated with incorrectly stored imported drugs. Strickland, 466 U.S. at 687-94.

Accordingly, Petitioner does not meet his burden of substantiating his claim for ineffective assistance of counsel on this basis. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

c) Testimony of Jessica Perez, Melinda Funk, and Norma Franco regarding Petitioner's conduct

Petitioner argues his counsel provided him with constitutionally defective assistance when he failed to object and move to strike testimony from Jessica Perez, Melinda Funk, and Norma Franco about their understanding and belief that the importation of the drugs into the United States and administration of those drugs to Petitioner's patients was wrong and illegal. (Mot. at ¶ 6.1; Reply at 5-6.) Petitioner argues, in response to the Government's contention that defense counsel did object to this testimony, that there were several points at which Perez, Funk, and Franco testified about their beliefs that the importation of, and treatment of patients with, the drugs was illegal, and defense counsel failed to object. (Reply at 5-6.)

Petitioner offers no argument, factual analysis, or legal authority to demonstrate why or how the aforementioned testimony was irrelevant, unduly prejudicial, or improper character evidence, or, more

importantly, how defense counsel's failure to object to or move to strike this testimony fell below the "objective standard of reasonableness" "under prevailing professional norms." Strickland, 446 U.S. at 688; (see Reply at 5-6.) Petitioner only points out instances in Perez's, Funk's, and Franco's testimony where they stated their beliefs as to the legality or illegality of the conduct at issue, to which defense counsel did not object. (Mot. at ¶ 6.1; Reply at 5-6.) Petitioner offers nothing to support his argument but bald conclusions, which do not warrant habeas relief. Jones v. Gomez, 66 F.3d at 205.

In the first place, Petitioner's claim on this basis is, in large part, belied by the record. The relevant portions of the testimony of Funk, a nurse practitioner who worked in Petitioner's office, concerned only her professional training as a nurse practitioner; she did not testify about her belief regarding Petitioner's conduct. (See RT Apr. 30, 2009, Doc. No. 229, at 102-104; Mot. at 6.1.3 (limiting claim to Funk's testimony found on pages 102 through 104).) Likewise, Perez's testimony concerned her reasons for her decision to stop working for Petitioner; she did not express a belief that Petitioner's conduct was illegal. (See RT Apr. 30, 2009, Doc. No. 229 at 111-112; Mot. at 6.1.3 (limiting claim to Perez's testimony found on pages 111 and 112).)

Franco, another nurse practitioner who worked in Petitioner's office, testified about her discussions with co-workers regarding their concerns about Petitioner's use of imported drugs. (See RT Apr. 30, 2009, Doc. No. 229 at 13-14; Mot. at 6.1.3 (limiting claim to Franco's testimony found on pages 13 and 14).) Franco testified that Perez told her that bringing the drugs into the United States was "wrong and that it was illegal to bring those medications." (RT Apr. 30, 2009, Doc. No. 229 at 14.) She went on to say that Perez's statement to her was "how [she] knew that Dr. Patwardhan was doing something wrong." (Id.) Contrary to Petitioner's argument, Franco did not specifically express an opinion that Petitioner's conduct was illegal. (Id.) Moreover, Petitioner does not show how Franco's brief testimony on this subject "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. Instead, Petitioner offers only conclusory arguments. Jones v. Gomez, 66 F.3d at 205; (see Mot. at 6.1.3; Reply at 5-6.).

Accordingly, Petitioner does not meet his burden of substantiating his claim for ineffective assistance of counsel on this basis. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

d) Testimony of Melinda Funk and Charlene Craven about Petitioner's character for greediness

Petitioner argues his defense counsel provided ineffective assistance of counsel when he failed to object to irrelevant and unfairly prejudicial character evidence about Petitioner's purported greed that was introduced through the testimony of Melinda Funk and Charlene Craven. (Mot. at ¶ 6.1; Reply at 6-7.) Petitioner contends his attorney should have objected to Funk's testimony regarding Petitioner's instruction to have patients use a treadmill in Petitioner's office and Craven's testimony discussing the practice in Petitioner's office of seeking reimbursement from Medicare for procedures and treatment that exceeded the allowable charges set by Medicare. (Reply at 6-7 ("Funk's testimony implied that Patwardhan improperly ordered use of the office treadmill to increase his profit, yet there was no evidence that Patwardhan was motivated by anything other than his patients[']' proper medical treatment. Similarly Craven's testimony implied that Patwardhan himself requested reimbursement from Medicare for more than the allowable amount.").)

1. Funk's testimony

Funk testified at trial that there was a treadmill in Petitioner's office that was not being used and

Petitioner told Funk to begin using the treadmill for patients "[b]ecause it was bought and it needed to be utilized." (RT Apr. 30, 2009, Doc. No. 229 at 109-111.) Government counsel asked Funk how much money the office would charge for patients' use of the treadmill, to which Funk responded that she did not know. (Id. at 111.) The prosecutor then asked Funk her understanding as to why tests needed to be done on the treadmill at the office as opposed to another location, to which defense counsel objected; the Court sustained the objections. (Id.) Funk did not testify further on the topic of the treadmill. (Id.)

Petitioner's claim that his attorney rendered ineffective assistance on this basis is fails. Funk's testimony on this topic was limited to the reason for the placement of the treadmill in the office and its use. (Id.) As soon as the prosecutor began questioning Funk further about the treadmill, defense counsel objected, the Court sustained the objection, and counsel for the Government moved on to a different area of questioning. (Id.) Petitioner does not show that Funk's testimony on this topic cast a negative light on his character. More importantly, Petitioner does not demonstrate how defense counsel, who succeeded in stopping Funk from testifying further on the topic and forced the Government to move on to a different area of questioning, provided assistance

that fell below the "objective standard of reasonableness" "under prevailing professional norms." Strickland, 446 U.S. at 688.

Moreover, Petitioner does not show how Funk's brief testimony about the treadmill unduly prejudiced him such that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. Petitioner's argument in this regard is conclusory and without factual and legal authority. Jones v. Gomez, 66 F.3d at 205.

2. Craven's testimony

Craven, a medical reviewer for a contracting company that processed Medicare claims, testified at trial about the procedure to bill for reimbursement for medical care from Medicare. (RT May 5, 2009 a.m., Doc. No. 230 at 11-27.) In addition, Craven testified she had reviewed Petitioner's submissions for Medicare reimbursement from 2006 to 2008 and concluded that the amount Petitioner billed to Medicare typically exceeded the amount allowed by Medicare's fee schedule. (Id. at 16-17.) Defense counsel cross-examined Craven and asked her whether or not doctors billing more than the allowed amount to Medicare was common, to which she replied it was common and explained there was no rule against billing for more

than the allowable amount because Medicare limits reimbursement according to a fee schedule that sets the allowable amount. (Id. at 23.)

As with Funk's testimony, Petitioner's claim that his attorney rendered ineffective assistance based on Craven's testimony is unavailing. Defense counsel cured any purported prejudice to Petitioner by following up with Craven on cross-examination and having her explain to the jury that it is a common practice of doctors to submit requests for reimbursement to Medicare that far exceed the Medicare allowable amount, set by fee schedule. It was defense counsel's reasonable tactical decision to present the issue to the jury in such a way, instead of objecting to Craven's testimony on direct examination. See Furman v. Wood, 190 F.3d at 1006; Guam v. Santos, 741 F.2d at 1169; see also Alcaraz v. Giurbino, 2010 WL 3582938, at *15-16 (E.D. Cal. Sept. 9, 2010) (finding counsel's decision not to object to unfavorable testimony on direct examination but instead inquire further with the witness on cross-examination was a reasonable tactical decision not constituting deficient performance); cf. Griffin v. Harrington, 2012 WL 5464609, at * 17-18 (C.D. Cal. Nov. 7, 2012 ("even if petitioner's counsel had made a deliberate, tactical decision to waive his objection to [a witness' unsworn] testimony and instead focus solely on his cross-examination of [the

witness], that tactical choice would have fallen below an objective standard for reasonable representation of petitioner" because had counsel objected to the witness providing unsworn testimony, counsel could have convinced the court to exclude the witness from testifying and the witness would not have provided hurtful testimony to the defense.) Petitioner has not shown how defense counsel's conduct fell below the "objective standard of reasonableness" "under prevailing professional norms." Strickland, 446 U.S. at 688.

Moreover, Petitioner does not show how Craven's testimony about Petitioner's Medicare reimbursement practices unduly prejudiced him such that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. Petitioner's argument in this regard is conclusory and without factual and legal authority. Jones v. Gomez, 66 F.3d at 205.

Accordingly, Petitioner has not met his burden of substantiating his claim for ineffective assistance of counsel on this basis and he is not entitled to habeas relief. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

e) Testimony of Velma Yep and Jessica Young about their guilty pleas and admission of their charging documents and plea agreements

Petitioner argues his trial counsel was constitutionally ineffective because he questioned Velma Yep and Jessica Young about their guilty pleas and moved to admit the plea agreements and charging documents into evidence, which Petitioner now claims was inculpatory evidence. (See Mot. at ¶ 6.1; Reply at 7-9.) In particular, Petitioner argues, "[t]his evidence was irrelevant and unfairly prejudicial as it improperly suggested that their guilty pleas provided evidence of Yep and Young's culpability for the conspiracy with which Patwardhan was charged and the unlawful importation of cancer-treatment medicine by Young which Patwardhan was alleged to have aided and abetted, notwithstanding that Yep and Young were not charged with and did not plead guilty to these charges." (Reply at 8.)

Yep, a nurse practitioner who worked for Petitioner, and Young, Petitioner's office manager, each testified that they pled guilty to a misdemeanor, not involving a crime with an element of intent to defraud. (See RT May 1, 2009 a.m., Doc. No. 225 at 78-79, 82-83; RT May 1, 2009 p.m., Doc No. 156, at 6-9, 12-19; RT May 6, 2009, Doc. No. 231 at 90-91.) During cross-examination, defense counsel asked, and Yep and Young testified, about

their obligation, pursuant to their plea agreements, to cooperate with the Government. (See RT May 1, 2009 p.m., Doc. No. 156, at 7-9, 12-19; RT May 6, 2009, Doc. No. 231 at 47.) Young also testified that she met with the Government attorneys several times over the course of the case, including trial preparation. (RT May 6, 2009, Doc. No. 231 at 29.)

Petitioner does not explain, let alone support with factual or legal authority, how this conduct constituted constitutionally ineffective assistance of counsel. Defense counsel questioned both witnesses about their motivations for testifying, which the jury could have concluded might call their credibility into question; defense counsel's effort to impeach these witnesses with their plea agreements was entirely reasonable. See Davis v. Alaska, 415 U.S. 308, 316 (1974) ("the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By doing so the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness."); see also Fed. R. Evid. 607

("Any party, including the party that called the witness, may attack the witness's credibility."). Petitioner does not show how his attorney's performance fell below the "objective standard of reasonableness" "under prevailing professional norms." Strickland, 446 U.S. at 688.

Finally, Petitioner does not show how this evidence unduly prejudiced him such that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 446 U.S. at 686. Instead, Petitioner's arguments are conclusory and do not warrant habeas relief. Jones v. Gomez, 66 F.3d at 205.

Accordingly, Petitioner has not met his burden of substantiating his claim for ineffective assistance of counsel on this basis and he is not entitled to habeas relief. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

2. Hearsay evidence

Petitioner argues his counsel "failed to object and/or move to strike hearsay evidence which also violated [Petitioner's] Sixth Amendment right to confrontation." (See Mot. at ¶ 6.2.)

a) Testimony of Melissa Armijo about Customs officer's search for declarations forms

Petitioner argues his counsel rendered constitutionally deficient assistance when he failed to object to or move to strike Melissa Armijo's[5] testimony regarding the search for customs records by a non-testifying customs officer. (Mot. at ¶ 6.2; Reply at 9.) According to Petitioner, because Armijo testified that Customs only found one customs declaration submitted by Petitioner after searching the agency's records:

> "the jury was left to infer that Patwardhan did not declare anything in his Customs declarations when he brought imported medicine into the Government because such declarations otherwise would have been maintained by Customs and been admitted into evidence. Given that Armijo never actually conducted a search for Patwardhan's Customs declaration [], such an inference was improper."

(Reply at 9 (internal citation omitted).)

At trial, Armijo testified that she was involved in searching for the declarations, but that she "had somebody else search for them" physically and report their findings back to her. (See RT May 5, 2009 a.m., Doc. No. 230 at 79.) After the Customs agent conducted

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[5] Armijo was the Chief Customs and Border Protection Officer at the Los Angeles International Airport.

the search, one declaration form was found that could be attributed to Petitioner, reflecting his purchase of a silver cup in London in 2008. (Id. at 99.)

Petitioner offers no authority for his contention that Armijo's testimony caused the jury to make an improper inference, nor any authority that his counsel's decision not to object or move to strike that testimony constituted ineffective assistance. Strickland, 446 U.S. at 688. Contrary to Petitioner's position, defense counsel made a reasonable tactical decision to argue at multiple points during trial that the jury should make an inference from this evidence that was favorable to Petitioner, i.e., that the failure of Customs to find Petitioner's Customs declarations forms, save one, should be attributed to Customs having lost or thrown away the forms. (See, e.g., RT Apr. 29, 2009, Doc. No. 224, at 33-34; RT May 7, 2009 p.m., Doc. No. 232 at 18-23); Strickland, 466 U.S. at 689-90; Furman v. Wood, 190 F.3d at 1006; Guam v. Santos, 741 F.2d at 1169. Defense counsel's argument on this point was consistent with the defense that Petitioner did not know he was engaging in illegal conduct when he imported the medicine, as he consented to searches by Customs agents every time he entered the United States and did not try to hide anything from Customs agents, including on the occasions he carried imported drugs in his luggage. Petitioner's

argument that his counsel rendered deficient performance on this basis is conclusory, unsupported by the record, and does not warrant habeas relief. Jones v. Gomez, 66 F.3d at 205.

In addition, Petitioner does not show how this testimony unduly prejudiced him such that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. The fact that Customs agents searched for declarations filled out by Petitioner and found only one was not disputed at trial. See Flournoy v. Small, 681 F.3d 1000, 1006 (9th Cir. 2012) (finding defense counsel's failure to object to evidence that was undisputed at trial did not satisfy the petitioner's burden to prove prejudice under Strickland because the petitioner failed to show how the exclusion of the evidence reasonably could have resulted in a different outcome of the trial). Defense counsel offered the jury a reasonable explanation of the state of this evidence and he suggested that the jury make an inference from the evidence in Petitioner's favor. (See RT Apr. 29, 2009, Doc. No. 224, at 33-34; RT May 7, 2009 p.m., Doc. No. 232 at 18-23.) Especially in light of defense counsel's arguments to the jury, Petitioner fails to demonstrate how the admission of evidence regarding an undisputed fact changed the outcome

of his trial. Strickland, 466 U.S. at 686; Flournoy, 681 F.3d at 1006.

Accordingly, Petitioner has failed to meet his burden of substantiating his claim for ineffective assistance of counsel on this basis and he is not entitled to habeas relief. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

b) Jessica Young's notes

Petitioner argues his counsel rendered ineffective assistance when he failed to object to the admission into evidence of Jessica Young's notes reflecting the prices of the imported drugs and their domestic counterparts. (Mot. at ¶ 6.2; Reply at 9-10.) Petitioner argues the notes were "particularly probative as to Dr. Patwardhan's motive" yet contends they "were irrelevant to Patwardhan's state of mind as there was no evidence that he ever reviewed the notes." (Reply at 9-10.)

This ground lacks merit and is belied by the record. At trial, defense counsel lodged objections to the evidence, i.e., Exhibits 75-77, 79 and 82, to which Petitioner now claims his counsel did not object, and these exhibits were not admitted into evidence nor were they published to the jury. (See RT May 5, 2009 p.m., Doc. No. 182 at 25 (defense counsel lodged objection to

the Government' Exhibits 75-77, 79, 82); List of Exhibits and Witnesses, Doc. No. 163 at 18 (reflecting the Government' Exhibits 75-77, 79, and 82 were never admitted into evidence; Mot. at 6.2.2[6] (limiting basis or ineffective assistance of counsel claim to the entry of United States' Exhibits 75-77, 79, and 82).)

Accordingly, Petitioner has not met his burden of substantiating his claim for ineffective assistance of counsel on this basis and he is not entitled to habeas relief. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

3. Inculpatory evidence

Petitioner argues his counsel "introduced inculpatory evidence," citing four examples, and that by doing so his attorney rendered ineffective assistance of counsel. (See Mot. at ¶ 6.3; Reply at 10-12.) Specifically, Petitioner claims his attorney violated his constitutional right to effective assistance of counsel when he questioned, or did not object to certain testimony of, Melinda Funk, Velma Yep, Jessica Young, and

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[6] To the extent Petitioner sought to argue his claim for ineffective assistance applied to the admission of all of Young's notes into evidence and her testimony regarding those documents and did not intend to limit his claim to the Government' Exhibits 75-77, 79, and 82, Petitioner did not make such a claim in his Motion. (See Mot. at 6.2.2.) The Court considers and addresses only those claims properly raised in Petitioner's Section 2255 Motion.

Dr. Noam Drazin, as well as to the admission into evidence of Yep and Young's criminal records, and his counsel's entry into a stipulation as to Petitioner's Medicare billing. (Id.)

Petitioner's argument is foreclosed by the Ninth Circuit's decision in Xiong v. Felker, 681 F.3d 1067 (9th Cir. 2012). In Xiong, the Ninth Circuit found when defense counsel takes "a calculated risk in an attempt to elicit testimony that he was ultimately unable to elicit" and instead elicits unfavorable testimony, "this is not enough to demonstrate the requisite incompetence, nor prejudice" required by Strickland v. Washington, 466 U.S. 668 (1984). Xiong, 681 F.3d at 1078-1079. Assuming, arguendo, Petitioner is correct that his attorney elicited unfavorable testimony during cross-examination, "this is not enough" to demonstrate his attorney rendered ineffective assistance. Id.

Moreover, Petitioner does not show how this purported inculpatory evidence unduly prejudiced him such that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Accordingly, Petitioner does not meet his burden of substantiating his claim for ineffective assistance of

counsel on this basis and he is not entitled to habeas relief. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

4. Exculpatory evidence

Petitioner argues his counsel "failed to adequately investigate and/or present exculpatory evidence." (See Mot. at ¶ 6.4; see also Reply at 12-15.) Specifically, he argues his counsel: (1) failed to develop the testimony of Young and Yep that each lacked criminal intent and each did not tell Petitioner about their means of importing drugs; (2) failed to develop the testimony of Young that Petitioner did not participate in his office's Medicare billing; and (3) failed to elicit testimony that the active ingredients in the imported drugs were the same as those found in the FDA-approved medications. (Reply at 12-15.)

"Th[e] [Ninth Circuit] [] has repeatedly held that "[a] lawyer who fails adequately to investigate and introduce ... [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999) (counsel's failure to review key documents corroborating defense witness's testimony constituted deficient performance); see also Avila v.

Galaza, 297 F.3d 911, 919 (9th Cir. 2002) (counsel's failure to investigate evidence that defendant's brother was the shooter constituted deficient performance); Lord v. Wood, 184 F.3d 1083, 1095-96 (9th Cir. 1999) (counsel's failure to call key witnesses whose testimony undermined the prosecutor's case constituted deficient performance); Sanders v. Ratelle, 21 F.3d 1446, 1457 (9th Cir. 1994) (counsel's failure to investigate evidence that someone else was the killer constituted deficient performance); see also Hill v. Lockhart, 474 U.S. 52, 59 (1985) (failure to investigate a meritorious defense may constitute ineffective assistance of counsel). "The failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002); see also Harris v. Wood, 64 F.3d 1432, 1435-37 (9th Cir. 1995) (holding that counsel's failure to retain an investigator and interview many of the individuals identified in the police reports was deficient performance).

"There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus mak[ing] particular investigations unnecessary." Cullen v. Pinholster, 563 U.S. __, 131 S. Ct. 1388, 1408 (2011) (citations and internal quotations omitted) (alteration in original). "Those decisions are due 'a heavy measure

of deference.'" Id.; see also Leavitt v. Arave, 646 F.3d 605, 608 (9th Cir. 2011) ("Judicial scrutiny of counsel's performance is highly deferential."). "[S]trategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengable." Leavitt, 646 F.3d at 608 (quoting Strickland, 466 U.S. at 690). Hence, to prove an attorney's deficient performance, a petitioner must demonstrate that the attorney "made errors that a reasonably competent attorney acting as a diligent and conscientious advocate would not have made." Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985).

Petitioner fails to submit admissible evidence demonstrating what Young and Yep would have said had they been asked the questions Petitioner now argues his counsel should have asked them. He also fails to submit what evidence or testimony defense counsel would have discovered had he conducted an appropriate investigation. See, e.g., Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (“[petitioner] offers no concrete support for his speculation” regarding his ineffective assistance claim); United States v. Ashimi, 932 F.2d 643, 650 (7th Cir. 1991) (“self-serving speculation will not sustain an ineffective assistance claim.”) Without admissible evidence, Petitioner’s claim is based on mere speculation and is conclusory. Jones v. Gomez, 66 F.3d at 205.

Moreover, without admissible evidence regarding what Young and Yep would have said or what evidence would have been adduced had defense counsel properly investigated the case, Petitioner cannot demonstrate his counsel "made errors that a reasonably competent attorney acting as a diligent and conscientious advocate would not have made." Butcher v. Marquez, 758 F.2d at 376; see also Strickland, 466 U.S. at 691; cf. Cannedy v. Adams, 706 F.3d 1148, 1162-63 (9th Cir. 2013) (finding counsel rendered deficient performance because "[n]o competent lawyer would have declined to interview such a potentially favorable [exculpatory] witness when that witness had been clearly identified [by the defendant to his attorney], the witness was easily accessible and willing to provide information, and trial counsel faced a dearth of defense witnesses."). Nor can he demonstrate that his counsel's purported failure in this regard prejudiced him such that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Accordingly, Petitioner has not met his burden of substantiating his claim for ineffective assistance of counsel on this basis and he is not entitled to habeas relief. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

5. Theories of defense argued to the jury

Petitioner argues his counsel "failed to argue viable theories of defense to the jury in closing argument," i.e., the lack of criminal intent of Petitioner's co-conspirators and Petitioner's lack of criminal intent. (See Mot. at ¶ 6.5; see also Reply at 15-17.)

In fact, Petitioner's counsel argued both points to the jury during his closing argument. Hence, this claim is meritless.

First, Petitioner's counsel argued repeatedly at trial that Petitioner lacked the requisite criminal intent for the charged offenses because Petitioner did not believe he was engaging in illegal conduct. (See, e.g., RT Apr. 29, 2009, Doc. No. 224 at 21 ("This case comes down to one thing. It comes down to the question of whether Dr. Patwardhan knew that there was a problem with bringing these medicines into the country.... But the issue is whether [Dr. Patwardhan] acted with the intent to defraud or deceive anyone."); RT May 7, 2009 p.m., Doc. No. 232 at 9 ("if you look at Dr. Patwardhan's actions, you will see that he did not act like a person who knows that the thing he is holding is evidence of a crime."), 27 ("Can one conclude beyond a reasonable doubt that a person who acted this way knows that what he is doing is illegal?"), 38 ("the evidence shows that Customs

allowed Dr. Patwardhan to bring the medicine into the country. He believed he was allowed to bring them in. His actions speak louder than words about what he believed between 2002 and 2008. He would have no reason to conceal or lie about something that he thought was legal, which leads to the conclusion, that because it cannot be said beyond a reasonable doubt that Dr. Patwardhan acted with intent to defraud or acted with the knowledge that he was breaking the law or stealing from Medicare, the only just verdict in this case is not guilty.").) Petitioner's conclusion that his attorney failed to argue this point to the jury during closing argument is belied by the record. (See RT May 7, 2009 p.m., Doc. No. 232 at 9, 27, 38.)

Likewise, Petitioner's counsel argued to the jury that Young and Yep thought their conduct was legal and "never admitted to trying to fool anyone about anything" despite their entering into guilty pleas. (See RT May 7, 2009 p.m., Doc. No. 232 at 33-34, 36.) Petitioner's contention that his counsel failed to argue that Petitioner's unindicted co-conspirators lacked criminal intent during closing argument lacks merit.

Accordingly, Petitioner has not met his burden of substantiating his claim for ineffective assistance of counsel on this basis and he is not entitled to habeas

relief. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721.

6. Cumulative errors

Petitioner argues his counsel "committed cumulative errors." (See Mot. at ¶ 6.6.)

As discussed, supra, the Court has rejected each of Petitioner's claims of error by defense counsel as either belied by the record, unsubstantiated, or not error in the first instance.

Accordingly, the Court finds Petitioner has failed to demonstrate he was prejudiced by the purported cumulative errors. Murtishaw v. Woodford, 255 F.3d at 939; United States v. Schaflander, 743 F.2d at 721. Moreover, his claim that he is entitled to habeas relief due to his counsel's cumulative errors is entirely conclusory and devoid of evidentiary support. Jones v. Gomez, 66 F.3d at 205.

B. Request for Leave to Conduct Discovery, Submit Expert Witness Affidavit, and for Evidentiary Hearing

In Petitioner's Reply brief, he asks the Court for leave to:

"supplement the record with an affidavit from an expert witness concerning the prevailing professional

> norms against which trial counsel's performance must be measured, allow Patwardhan to conduct discovery relating to the claim that trial counsel's failure to investigate and present exculpatory evidence was constitutionally ineffective, and set the matter for an evidentiary hearing to resolve the disputed issues of fact."

(Reply at 2.)

In habeas cases, "[p]retrial discovery may be employed in the course of a § 2255 hearing to the extent that the trial judge, in the sound exercise of his discretion, permits." Argo v. United States, 473 F.2d 1315, 1317 (9th Cir. 1973). In exercising that discretion, habeas courts are cautioned that they "should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation." Calderon v. U.S. Dist. Court for the Northern Dist. of Cal., 98 F.3d 1102, 1106 (9th Cir. 1996). "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Bramley, 520 U.S. 899, 904 (1997). "But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and

procedures for an adequate inquiry." Harris v. Nelson, 394 U.S. 286, 300 (1969).

"To earn the right to a[n] [evidentiary] hearing ... [a 2255 movant must] allege specific facts which, if true, would entitle him to relief." United States v. McMullen, 98 F.3d 1155, 1159 (9th Cir. 1996). The Ninth Circuit has recognized that even when credibility is at issue, no evidentiary hearing is required if it can be "'conclusively decided on the basis of documentary testimony and evidence in the record.'" Shah v. United States, 878 F.2d 1156, 1159 (9th Cir. 1989) (quoting United States v. Espinoza, 866 F.2d 1067, 1069 (9th Cir. 1989)). The court may deny a hearing if the movant's allegations, viewed against the record, fail to state a claim for relief or "are so palpably incredible or patently frivolous as to warrant summary dismissal." United States v. Mejia–Mesa, 153 F.3d 925, 931 (9th Cir. 1998).

The Court finds Petitioner fails to show good cause for discovery. He simply states in his Reply that "[i]n addition to requesting leave to expand the record by submitting an affidavit from an expert witness regarding the 'prevailing professional norms' by which trial counsel's conduct should be measured, Patwardhan requests leave to conduct discovery as to whether trial counsel

conducted a reasonable investigation."[7] (Reply at 13.) Petitioner does not explain the basis for his request for discovery, let alone what discovery he seeks to propound or from what sources. Likewise, he does not explain why he should be entitled to discovery at this point in the litigation, i.e., after the parties have briefed the Section 2255 Motion fully. Petitioner's request for discovery is supported by nothing but speculation and appears to be an attempt to engage in an impermissible "fishing expedition." Calderon, 98 F.3d at 1106.

Likewise, the Court denies Petitioner's request for leave to submit an affidavit from an expert witness. Expert testimony on prevailing professional norms is not necessary nor is it helpful to the Court. See Earp v. Cullen, 623 F.3d 1065, 1075 (9th Cir. 2010) ("Expert testimony is not necessary to determine claims of ineffective assistance of counsel ... [b]ecause a district court is qualified to understand the legal analysis required by Strickland ... ." (internal quotations and citations omitted)). Moreover, Petitioner offers no evidence or argument regarding what the expert could testify to that would be of assistance to the Court. Accordingly, the Court denies his request for

[7] By making this argument, Petitioner apparently concedes that his claim for ineffective assistance due to his counsel's failure to investigate is without evidentiary support, as discussed supra.

leave to supplement the record with an expert affidavit.

Finally, the Court finds Petitioner fails to make the necessary showing to substantiate his request for an evidentiary hearing. He argues such a hearing is necessary to resolve "disputed issues of fact." (Reply at 2.) Petitioner fails to demonstrate any material facts that are disputed between the parties and which need to be resolved at an evidentiary hearing. The facts in this case are undisputed, as they are evidenced by the Reporters' Transcripts of the proceedings below. The parties have argued differing interpretations of the testimony heard during the trial in this matter, but neither can dispute the actual testimony given by the witnesses or the veracity of the record. Accordingly, the Court finds no basis for holding an evidentiary hearing and denies Petitioner's request.

C. Certificate of Appealability

The Government argues the Court should not issue a Certificate of Appealability ("COA") in this case. (Opp'n at 25.)

Rule 11(a), Rules Governing Section 2255 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such

certificates are required in cases concerning detention arising "out of process issued by a State court," or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). The standard for issuing a COA is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

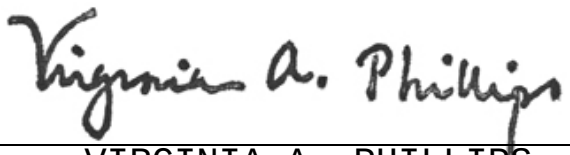
Here, as the Court has "rejected [Petitioner's] constitutional claims on the merits" and Petitioner has not shown that "reasonable jurists would find [the Court's] assessment of the constitutional claims

debatable or wrong," the Court denies a COA in this case. Slack v. McDaniel, 529 U.S. at 484; see Muth v. Fondren, 676 F.3d 815, 822 (9th Cir. 2012) (amended) (denying COA when petitioner failed to make "a substantial showing of the denial of a constitutional right....").

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Petitioner's § 2255 Motion, and dismisses this action with prejudice.

Dated: June 3, 2013



VIRGINIA A. PHILLIPS
United States District Judge